IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 13519 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
HON'BLE MS.JUSTICE H.N.DEVANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF CUSTOMS - Petitioner(s)

Versus

KIRIT MAGANLAL &CO &4 - Respondent(s)

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Appearance :

MR YN RAVANI for Petitioner No(s).: 1.

None for Respondent No(s).: 1, 2,3,4,5.

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CORAM :HON'BLE MR.JUSTICE D.A.MEHTA

HON'BLE MS.JUSTICE H.N.DEVANI

Date : 07/07/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. This petition stated to be a petition under Articles 226 and 227 of the Constitution of India is, in fact, under Article 227 of the Constitution, having challenged the order of Customs, Excise &Service Tax Appellate Tribunal, West Zone Bench, at Mumbai in Appeal Nos. E/312, 313, 314, 315 &360 of 2003, dated 30th June 2004.
2. The petitioner has stated that the following important questions of law arise for consideration by this Court :

(a) Whether the Tribunal has committed jurisdictional error by proceeding with the appeal filed by the respondents since appeal of the petitioners was pending before the Tribunal arising from the same order in the facts and circumstances of the case?
(b) Whether the Tribunal has committed jurisdictional error by taking into consideration new documents which were never part of the investigation or before the appellate authority being bill No.1/03 dated 15-1-1998 and other documents?
(c) Whether the production of new documents are an after thought?

1. Whether the Tribunal committed jurisdictional error by giving finding about gold bars that they are not of foreign mark though no such defence was raised by any one nor it was the case of the respondents and contrary to the case of the respondents that it has illegally imported foreign gold bars and the same is contrary to the panchnama dated 16-1-1998 showing foreign mark?

1. Before entering into the merits of the submissions made on behalf of the petitioner, it is necessary to take note of the fact that the order dated 30th June 2004 is an appealable order under the provisions of section 130 of the Customs Act, 1962(the Act). Hence, in light of availability of a statutory alternative remedy, the petition is required to be summarily rejected on this limited count.
2. However, the learned counsel for the petitioner Mr.Y.N.Ravani has made elaborate submission in relation to each of the issues raised. In relation to the Issue (a), it was submitted that CESTAT committed an error in hearing and disposing of only the appeal filed by the respondent assessee without linking up departmental appeal at the time of hearing. This contention requires to be stated to be rejected.
3. The first and foremost reason is the order which was under challenge before CESTAT was pronounced on 24th January 2003 and

as could be seen from the order of CESTAT, the appeals by the assessee were duly registered in 2003 itself. The period of limitation for challenging the order of Commissioner before the Tribunal is prescribed at a period of 90 days as stated in paragraph No.2 of the order itself and on going through the provisions of section 129A of the Act, it does not distinguish between either an assessee or the Commissioner. Therefore, the contention on behalf of the petitioner that they have preferred an appeal in light of provisions of Section 129D of the Act does not merit acceptance prima facie. However, it is not necessary for the Court to enter into any further discussion on this aspect of the matter. The only reason for referring to the date of issue of the order, namely 24th January 2003 is that the respondent assessee had preferred an appeal against that portion of the order by which the assessee was aggrieved, within the limitation prescribed under Section 129A, and even if the petitioner revenue has moved the Tribunal in terms of Section 129D of the act, by virtue of different periods of limitation prescribed, in the very nature of things, it is not possible for the Tribunal on its own to link up the two cross appeals unless and until this fact, namely, filing of cross appeals, is brought to its notice by the concerned party. Therefore, for the petitioner to treat this as being a jurisdictional error is not warranted. The petitioner having failed in its duty in pointing out the fact of filing of appeal when the Tribunal took up for hearing the assessee's appeal, it is not open to the petitioner to turn round and point a finger at the Tribunal in these circumstances. This is all the more necessary in light of the fact that the department was represented by junior departmental representative at the time of hearing before the Tribunal. If a litigant is not vigilant about its own rights, it cannot be permitted to complain about the so called lapse on part of the forum which is called upon to adjudicate the litigation between the parties.

4. In so far as the issues raised at (b) and [c] are concerned, the learned counsel for the petitioner has not been able to place on record as to what were the documents on record before the Tribunal and in absence of the same, it is not possible to accept the contention that a particular document is a new document. Apart from that, it is not even averred in the petition that the petitioner has taken inspection of the record of the Tribunal so as to make such averment. This assumes importance in light of the fact that the Tribunal is not in a position to reply to or

dispute the allegation made directly against the Tribunal. Therefore, even this ground does not merit acceptance.

5. Approaching this issue from a slightly different angle, as to whether a particular document was forming part of the record of the original proceedings and whether additional evidence was admitted by the Tribunal or not, are questions of fact in regard to which evidence has to be led and appreciated. Such an exercise is not within the scope of these proceedings.

6. In so far as ground (d) is concerned, on a plain reading, it becomes apparent that it cannot constitute any jurisdictional error, as such. At best, the petitioner can urge the same to be a mistake apparent on record and for this purpose, it can initiate proceedings for rectification of the order, if deemed fit. It is only the Tribunal which can state whether a particular defence was raised before it or not.

7. In these circumstances, it is not possible to entertain the petition on any of the grounds raised. The jurisdiction available to the High Court under Article 227 of the Constitution is limited in scope. The Court is only required to ascertain as to whether the Tribunal while passing the impugned order has jurisdiction, if it has jurisdiction; whether the same is exercised in proper manner or the Tribunal has exceeded the jurisdiction vested in it, and lastly, whether the Tribunal has exercised jurisdiction which was not vested in it. On going through the impugned order of Tribunal, it is not possible to state that any of the conditions are satisfied enabling this Court to intervene.

8. The position in law is well settled. Even if on same set of facts and material on record, it might be possible for the High Court to arrive at a different conclusion , that by itself is not sufficient to enable the High Court to interfere with findings of fact recorded by the Tribunal. In the present case, it is not possible to state that the view adopted by the Tribunal cannot be arrived at. Therefore, even on this count, this Court cannot entertain the petition.

9. The petition is accordingly rejected.

[[D.A.MEHTA, J.]

[H.N.DEVANI, J.]

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